



DEMOCRATIC NATIONAL COMMITTEE

October 12, 2004

By Hand

Lawrence Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

MUR # 5562

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FEDERAL ELECTION
COMMISSION
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2004 OCT 12 P 4: 54

Re: **Complaint Against Sinclair Broadcast Group**

Dear Mr. Norton:

Pursuant to the Commission's rules, 11 C.F.R. §111.4, the Democratic National Committee, 430 S. Capitol Street, Washington, D.C. 20003, by and through undersigned counsel, files this complaint against Sinclair Broadcast Group, 10706 Beaver Dam Road, Hunt Valley, MD 2103 ("Sinclair"), for violations of the Federal Campaign Finance Act of 1971 as amended (the "Act") and the Commission's regulations. As explained in detail below, Sinclair is about to make an unlawful corporate-funded electioneering communication and corporate in-kind contribution to the Bush-Cheney '04 campaign and the Republican National Committee, by ordering its broadcast stations to pre-empt their regular programming days before the November 2 election to air a film that attacks Senator John Kerry.

This is the first time, in the 30-year history of the Act, that the DNC has ever filed a complaint with the Commission against a media outlet. Indeed, the DNC fully understands and appreciates the need for broad application of the Act's media exemption, 2 U.S.C. §431(9)(B)(i). The circumstances surrounding Sinclair's proposed activity, however, are so extraordinary and exceptional as to warrant a finding by the Commission that the media exemption simply cannot and does not apply in this case.

I. Factual Background

A. Sinclair Broadcast Group

Sinclair owns numerous television broadcast stations located throughout the country. The company has a long and sorry history of misusing its corporate resources for blatantly partisan purposes.

According to the Commission's records, David Smith, Chief Executive Officer of Sinclair, gave the maximum contribution to Bush Cheney 2004 and Frederick Smith, Vice President of the company, has donated \$175,000 to the RNC since 1999, as well as contributing the maximum legal amount to the Bush -Cheney 2000 and Bush-Cheney 2004 primary committees. Julian D. Smith, Vice President and corporate Secretary of the corporation, and Robert Smith, an analyst with the company, both contributed the legal maximum to Bush-Cheney 2004. In all in the 2003-04 political cycle, Sinclair executives "have given nearly \$68,000 in political contributions, 97% to Republicans, ranking it 12th among top radio and TV station group contributors...." (Los Angeles *Times*, Oct. 9, 2004, citing Center for Responsive Politics).

In 2002, Sinclair forced its more than 60 stations, "to broadcast spots declaring support for the for the efforts of President Bush and other government leaders....At WBFF [a Baltimore Maryland station owned by Sinclair], anchors were drafted to tape the messages in support of the white House, stirring internal fears they were compromising their professional objectivity." (Baltimore *Sun*, 9/19/01).

In July 2003, Sinclair refused to air a DNC ad criticizing President Bush. "While three Madison [Wisconsin] TV stations are airing an ad this week from the Democratic National Committee criticizing President Bush for his Iraq war policies, one station—Fox 47—is taking heat for deciding not to air the ad. The 30-second spot...includes a clip of Bush's State of the Union address regarding Iraq's acquisition of uranium from Africa. Executives of the Maryland-based Sinclair Broadcast Group, the parent company of Fox 47, did not return phone calls." (Madison *Capital Times*, 7/24/03).

Sinclair stations also ran fake news segments produced by the Bush Administration to promote the Administration-supported Medicare law. Video news releases were distributed to local television stations to be run as part of the stations' "news" programming. In May, 2004, the General Accounting Office found that production of these fake news segments violated federal law. (Pittsburgh *Post-Gazette*, 3/20/04; GAO, Decision in Matter of Center for Medicaid & Medicare Services—Video News Release, May 19, 2004).

In April 2004, Sinclair forced those stations it owns which are affiliates of the ABC network not to air the ABC News special honoring the 500 U.S. soldiers who had died in Iraq by that time. (CNN, April 30, 2004). Senator John McCain commented at the time, of Sinclair, that "Your decision to deny your viewers an opportunity to be

reminded of war's terrible costs, in all their heartbreaking detail, is a gross disservice to the public." (CNN, April 30, 2004).

B. The Proposed Airing of "Stolen Honor"

According to press reports, Sinclair has ordered its broadcast stations—which reach nearly a quarter of the nation's homes having television—to preempt their regular programming “just days before the November 2 election to air a film that attacks Sen. John F. Kerry’s activism against the Vietnam War.” (Los Angeles *Times*, Oct. 9, 2004, page A1). The film, “Stolen Honor: Wounds That Never Heal” is reportedly “funded by Pennsylvania veterans” and “features former POWs accusing Kerry—a decorated Navy veteran turned war protestor – of worsening their ordeal by prolonging the war. Sinclair will preempt regular prime-time programming from the networks to show the film....” (*Id.*).

According to the LA *Times* report, all of Sinclair’s 62 stations—of which 14 are located in key presidential battleground states--have been told to preempt their regular network programming for one hour, during prime time, between October 21 and October 24, depending on the city. (*Id.*). This could mean, for example, that a Sinclair-owned ABC affiliate would, on Sunday night October 24, be forced to preempt “Desperate Housewives,” the top-rated program in the nation in the last ratings week. Yet, according to a memo sent by Sinclair’s vice president for programming to all station executives, all the Sinclair stations will be required to air the film *without* commercials, forcing those stations to forgo significant advertising income. (Baltimore *Sun*, Oct. 12, 2004).

Sinclair Vice President Mark Hyman—who personally appears on the air daily on his stations to give an extreme right-wing commentary, often attacking Senator Kerry (Milwaukee Journal Sentinel, Nov. 24, 2003)—has stated that Sinclair “decided to air the film after it was rejected by the major broadcast networks....” (Miami *Herald*, Oct. 11, 2004).

It is not surprising that no legitimate media outlet has been willing to air this film. “Stolen Honor” has, in fact, *not* been made by a legitimate documentary film producer, but by one Carlton Sherwood, a disgraced former television reporter who resigned from WDM-TV, Channel 9 (now WUSA-TV, Channel 9), in Washington, D.C., after broadcasting a four-part series attacking the group that built the Vietnam Veterans memorial. (Washington *Post*, Nov. 8, 1984; Washington *Post*, Nov. 9, 1984). The resignation took place just before the television station was forced to retract the Sherwood reports and to apologize for them. (Washington *Post*, Nov. 8, 1984).

After resigning from the television station, Sherwood went to work for the Washington Times, where he wrote a book profusely praising Reverend Sun Myung Moon. The book is entitled, *The Persecution and Prosecution of the Reverend Sun Myung Moon*. (Washington Post, May 26, 1991).

To the DNC's knowledge, Sherwood has never before produced a documentary or, for that matter, any other kind of film. And, as any review of the listings of Sinclair stations would show, it is highly unusual for Sinclair's stations to air a documentary of any kind.

II. Legal Analysis

On information and belief, the "Stolen Honor" film repeatedly refers to, pictures and attacks Senator Kerry who is, of course, the Democratic nominee for President. Broadcast of the film during the October 21-24 period, well within 60 days of the November 2, 2004 general election, clearly constitutes and "electioneering communication" within the meaning of 2 U.S.C. §434(f)(3)(A)(i) and 11 C.F.R. §100.29. This electioneering communication is being run by a corporation, Sinclair Broadcasting, and therefore violates the Act, 2 U.S.C. §441b(a), unless one of the exceptions to the term "electioneering communications" applies.

The only exception that could conceivably apply is the media exception under 2 U.S.C. §434(f)(3)(B)(i), which exempts "a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate." The scope of this exemption, of course, is identical to that of the general media exemption from the definition of "expenditure," 2 U.S.C. §431(9)(B)(i), and should be analyzed in the same way. *See, e.g.,* FEC Advisory Opinion 2004-30.

The Act's "[c]orporate contribution prohibitions would apply with equal force to all media corporations unless their activities fall within the specific exemption for any news story, commentary, or editorial distributed through the facilities of any broadcasting station...." FEC Advisory Opinion 1982-44. *See also,* FEC Advisory Opinion 1996-2 (corporation's donation of its facilities is unlawful unless media exemption applies).

In this case, the exemption clearly does not apply, for two reasons. First, the "Stolen Honor" film is not a "news story, commentary or editorial" within the meaning of the exemption. Although that phrase *can* include documentaries, "not every 'documentary' is entitled to the EC media exception." FEC Advisory Opinion 2004-30.

In AO 2004-30, the Commission, relying on *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), indicated that factors to be considered in determining whether a documentary film is entitled to the exemption include considerations of form, such as how the film was produced and to whom it was disseminated. In AO 2004-30, the Commission concluded that a film about John Kerry produced by Citizens United, an incorporated membership organization, which the organization proposed to broadcast by purchasing television time, was an unlawful electioneering communication. The Commission concluded that the group does not regularly produce documentaries or pay to broadcast them on television; "indeed, the very act of paying a broadcaster to air a documentary on television, rather than receiving

compensation from a broadcaster, is one of the 'considerations of form' that can help to distinguish an electioneering communication from exempted media activity.

In the case of Sinclair's proposed broadcast of "Stolen Honor," the company is obtaining the film, not from a legitimate documentary producer, but from a disgraced former reporter who has never before produced a documentary. The documentary was not, apparently, produced as a commercial venture, or even a non-profit educational venture, but as a *political* activity, supposedly by a group of Pennsylvania veterans. In fact the source of the funding is unclear, and there is no indication that Sinclair is actually paying the production company to broadcast this film, which would be the normal business practice. It would seem unlikely, in fact, given that Sinclair is forcing stations to run this film *without* commercials.

Given the fact that the film is not actually a news story, editorial or commentary, and given the exceptional circumstances of its production and broadcast, the film should not be considered to be entitled to the media exemption.

Second, in determining whether the media exemption applies to a particular activity undertaken by a media outlet, the Commission must consider "whether the press entity is acting as a press entity in performing the media activity." FEC Advisory Opinion 1998-17A, *citing* Advisory Opinion 1982-44 and *Reader's Digest Ass'n v. Federal Election Comm'n*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

In this case, Sinclair is *not* "acting as a press entity" in broadcasting "Stolen Honor." "[T]his is not a simple matter of whether the program at issue happened to air over a broadcast station's facilities... There must be an assessment of whether the entity involved in producing or paying for the program's airing engaged in a function that is within the ordinary course of business for a press entity." Matters Under Review 5110 and 5162, Statement of Reasons of Commissioner Scott E. Thomas at 1.

Here, Sinclair—a company run by major Bush-Cheney and Republican donors—is not running the film as part of its normal programming but is in fact *forcing* its stations to *preempt* their normal network programming to run this film. The film would be run in prime time, *commercial-free*, forcing stations to forego significant advertising income from the normal network and other programming that would be preempted.

The film would be run only a few days before the presidential general election. The film has been produced by a right-wing, disgraced former reporter who has never before produced a documentary film. Not a single major, established network would run it at all, yet Sinclair plans to run it, in prime time, for a solid hour, right before the election. There is no indication that Sinclair is paying anything for the rights to the film; it is difficult to see how they *could* pay given that no station is being permitted to sell commercial time; and, indeed, the source of funding for the film's production is unclear.

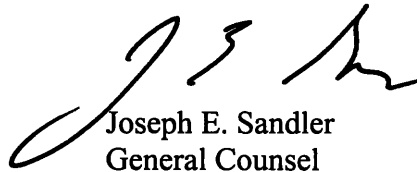
In these circumstances, it is impossible to conclude, with a straight face, that this program's airing is "within the ordinary course of business for a press entity." To the

contrary, it is crystal clear that Sinclair's decision to air this film is a brazen attempt to use the corporation's resources influence the outcome of the presidential election. The media exemption cannot and does not apply to such activity.

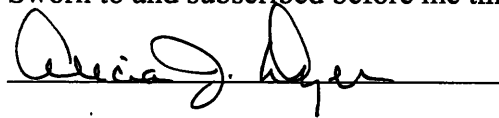
CONCLUSION

For the reasons stated above, the Commission should find reason to believe, pursuant to 2 U.S.C. §437g(a)(2), that Sinclair Broadcast Group has committed, or is about to commit, a violation of the Act, 2 U.S.C. §441b(a), and the Commission's regulations, and should conduct an investigation.

Respectfully submitted,


Joseph E. Sandler
General Counsel

Sworn to and subscribed before me this 12 day of October 2004.



Notary Public

My commission expires: 7-14-05